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Nos. 00-832 and 00-843

In the Supreme Court of the United States

NATIONAL CABLE TELEVISION ASSOCIATION, PETITIONER

v.

GULF POWER COMPANY, ET AL.

FEDERAL COMMUNICATION COMMISSION AND UNITED STATES OF AMERICA, PETITIONERS

v.

GULF POWER COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL PETITIONERS

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QUESTIONS PRESENTED

Certain provisions of the Pole Attachments Act, 47 U.S.C. 224 (1994 & Supp. IV 1998), direct the Federal Communications Commission to set "just and reasonable" rates, 47 U.S.C. 224(b)(1), that a utility may charge for "any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility," 47 U.S.C. 224(a)(4) (1994 & Supp. IV 1998). The questions presented are:

1. Whether those provisions of the Pole Attachments Act apply to attachments by cable television systems that are simultaneously used to provide high-speed Internet access and conventional cable television programming.

2. Whether those provisions of the Pole Attachments Act apply to attachments by providers of wireless telecommunications services no less than to attachments by providers of wireline telecommunications services.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the parties to the proceeding in the court of appeals were Alabama Power Company, Georgia Power Company, Southern Company Services, Tampa Electric Company, Potomac Electric Power Company, Virginia Electric & Power Company, Carolina Power & Light Company, Duquesne Light Company, Delmarva Power & Light Company, Public Service Electric & Gas Company, Houston Lighting & Power Company, Texas Utilities Electric Company, American Electric Power Service Corporation, Commonwealth Edison Company, Duke Energy Corporation, Union Electric Company, Florida Power and Light Company, the National Cable Television Association, MCI Telecommunications Corporation, U S WEST, Inc., Bell South Corporation, A T & T Corporation, SBC Communications, Inc., Pacific Bell, Nevada Bell, Southwestern Bell Telephone Company, GTE Service Corporation, Pennsylvania Cable & Telecommunications Association, Arizona Cable Telecommunications Association, and Ameritech Corporation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-41a[1]) is reported at 208 F.3d 1263, and the order denying rehearing en banc (Pet. App. 42a-55a) is reported at 226 F.3d 1220. The principal order of the Federal Communications Commission (FCC), *In re Implementation of Section 703(e) of the Telecommunications Act of 1996:*

[1] "Pet. App." references in this brief are to the appendix to the petition for a writ certiorari in No. 00-843.

Amendment of the Commission's Rules and Policies Governing Pole Attachments, is reported at 13 F.C.C.R. 6777 (1998) and is reprinted in Pet. App. 56a-204a.

JURISDICTION

The judgment of the court of appeals was entered on April 11, 2000. A petition for rehearing was denied on September 12, 2000 (Pet. App. 55a). The petition for a writ of certiorari in No. 00-843 was filed on November 21, 2000. The petition for a writ of certiorari in No. 00-832 was filed on November 22, 2000. The Court granted the petitions for a writ of certiorari and consolidated the two cases on January 22, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The Pole Attachments Act, 47 U.S.C. 224 (1994 & Supp. IV 1998), is set forth at Pet. App. 205a-211a.

STATEMENT

1. Since the inception of cable television, cable operators have leased space on telephone or electric utility poles, or in underground utility conduits, for the attachment of cable distribution facilities, such as coaxial or fiber-optic cable and associated equipment. Pet. App. 5a; S. Rep. No. 580, 95th Cong., 1st Sess. 15 (1977). Constraints imposed by "zoning restrictions, environmental regulations, and start-up costs have rendered other options infeasible." Pet. App. 5a. The "monopoly" enjoyed by the power and telephone companies on poles and conduits "that could accommodate television cables has allowed them, in the past, to charge monopoly rents." *Ibid.* See generally *FCC* v. *Florida Power Corp.*, 480 U.S. 245 (1987).

To address that problem, Congress in 1978 enacted the Pole Attachments Act, Pub. L. No. 95-234, § 6, 92 Stat. 35 (47 U.S.C. 224 (1994 & Supp. IV 1998)). Then as now, the Act required the FCC to "regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable." 47 U.S.C. 224(b)(1). A "pole attachment" was defined as "any attachment by a cable television system to a pole, duct, conduit, or right-of-way owned or controlled by a utility." 47 U.S.C. 224(a)(4); see generally S. Rep. No. 580, *supra*. The FCC interpreted that provision to require it to ensure "just and reasonable" rates for all of a cable company's attachments, "regardless of the type of service provided over the equipment attached to the poles," and even if the attachments are used for "both traditional (*i.e.*, video) and nontraditional (*i.e.*, data) services on a 'commingled' basis." *Texas Utils. Elec. Co.* v. *FCC*, 997 F.2d 925, 927, 929 (D.C. Cir. 1993) (approving FCC interpretation).

2. The Pole Attachments Act was amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, which comprehensively revised the structure of regulation for the entire communications industry. Among the changes made by the Telecommunications Act were the following:

First, the 1996 amendments made the protections of the Pole Attachments Act available to certain entities beyond cable television operators. They accomplished that end by expanding the definition of the term "pole attachment" in Section 224 from "any attachment by a cable television system" to "any attachment by a cable television system *or provider of telecommunications service*." 47 U.S.C. 224(a)(4) (1994 & Supp. IV 1998) (emphasis added). Such "telecommunications service"

is in turn defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. 153(46) (Supp. IV 1998). See also p. 8 n.4, *infra* (statutory definitions of "telecommunications" and "telecommunications carrier").

Second, the 1996 amendments altered the specification of pole attachment rates that are applicable in particular contexts under the Act. Before 1996, Section 224(d) had set forth a particular formula for determining "just and reasonable" rates. In 1996, Congress provided that that formula "shall apply to the rate for any pole attachment used by a cable television system solely to provide cable service." 47 U.S.C. 224(d)(3) (Supp. IV 1998). Congress also provided that the Commission "shall * * * prescribe regulations in accordance with" a somewhat different formula "to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services." 47 U.S.C. 224(e)(1) (Supp. IV 1998).[2]

3. The FCC implemented the amendments to the Pole Attachments Act in *In re Implementation of Section 703(e) of the Telecommunications Act of 1996: Amendment of the Commission's Rules and Policies Governing Pole Attachments*, 13 F.C.C.R. 6777 (1998), see Pet. App. 56a-204a. As pertinent here, the Commission determined that the protections of Section 224

[2] In an additional significant change, the 1996 amendments added a new Section 224(f). That provision does not address rates, but instead provides that "[a] utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it." 47 U.S.C. 224(f)(1) (Supp. IV 1998).

continue to cover attachments used simultaneously for providing data services and traditional cable television service. *Id.* at 85a-89a. Such data services increasingly include "cable modem" service: the use of cable facilities—including the same wires over which conventional cable television signals are transmitted—to provide "broadband" (high-speed) Internet access to consumers. That technology "allows users to access the Internet at speeds fifty to several hundred times faster than those available through conventional computer modems connected to what is commonly referenced in the telecommunications industry as 'plain old telephone service.'" *AT&T* v. *City of Portland*, 216 F.3d 871, 873-874 (9th Cir. 2000). The Commission based its conclusion that the Act governed attachments used simultaneously to provide cable television and Internet access on the ground that it "is still obligated under Section 224(b)(1) to ensure that the 'rates, terms and conditions [for pole attachments] are just and reasonable,' and, as Section 224(a)(4) states, a pole attachment includes '*any* attachments by a cable television system.'" Pet. App. 90a (emphasis added). The Commission noted that that conclusion would remain valid regardless of whether a cable television system providing commingled Internet access is considered to be providing "cable service," "telecommunications service," or some other form of service. *Id.* at 89a-90a.[3] Finally, the Commission determined that the 1996

[3] Indeed, because the classification of cable Internet access as "cable service," "telecommunications service," or some other form of service is the subject of ongoing proceedings before the Commission concerning issues outside the Pole Attachments Act, the Commission expressly stated that it "d[id] not intend * * * to foreclose any aspect of the Commission's ongoing examination of those issues." Pet. App. 89a; see pp. 29-31, *infra*.

amendments extend the protections of Section 224 to wireless carriers no less than to other telecommunications carriers. *Id.* at 91a-96a.

4. A number of electric utility companies filed petitions for review of the FCC's order in the Third, Fourth, Sixth, Eighth, Eleventh, and D.C. Circuits. Pet. App. 14a-15a. Pursuant to the FCC's motion, the cases were consolidated in the Eleventh Circuit. *Id.* at 15a. In a ruling not at issue before this Court, a panel of the court of appeals unanimously held that challenges to various aspects of the FCC's orders under the Takings Clause were not ripe. *Id.* at 18a-19a. See also *id.* at 32a-35a (rejecting challenge to an additional portion of FCC Order). In the rulings that are at issue in this Court, however, the court of appeals panel divided. The majority reversed the FCC's conclusions that the Pole Attachments Act, as amended in 1996, authorizes it to regulate pole attachments by cable operators that supply Internet access as well as cable television service over their wires, *id.* at 26a-32a, and that the Commission has no less authority to regulate pole attachments to provide wireless telecommunications services than pole attachments to provide wireline telecommunications services, *id.* at 20a-26a.

a. The court of appeals rejected the FCC's conclusion "that Internet service provided by a cable television system * * * is subject to regulation under section 224(b)(1)'s mandate to 'ensure that the rates, terms, and conditions [for pole attachments] are just and reasonable.'" Pet. App. 26a. Although the court briefly adverted to the definition of "pole attachment" in Section 224(a)(4) of the pre-1996 Pole Attachments Act as "any attachment by a cable television system," see *id.* at 30a n.32, the court did not address the fact that that definition continues to define the pole

attachments subject to the post-1996 Act. Instead, the court noted the separate provisions of the amended Act that "call[] for the Commission to establish two rates for pole attachments." *Id.* at 27a. One of those provisions "applies to 'any pole attachment used by a cable television system solely to provide cable service.'" *Ibid.* (quoting 47 U.S.C. 224(d)(3) (Supp. IV 1998)). The other "applies to 'charges for pole attachments used by telecommunications carriers to provide telecommunications services.'" *Ibid.* (quoting 47 U.S.C. 224(e)(1) (Supp. IV 1998)). In the court's view, "[f]or the FCC to be able to regulate the rent for an attachment that provides Internet service then, Internet service must qualify as either a cable service or a telecommunications service." *Ibid.* Notwithstanding that the FCC had expressly declined to rule on the correct categorization of Internet access provided through cable modems, see pp. 29-30, *supra*, the court concluded that such Internet access is neither cable service, Pet. App. 27a-31a, nor telecommunications service, *id.* at 31a, and that the FCC therefore has no authority to regulate rates for pole attachments by cable operators that carry both cable television and Internet access through the same wires. See *id.* at 31a-32a, 30a n.32.

b. With respect to wireless telecommunications service, the amended Pole Attachments Act, as noted above, provides that the FCC shall ensure "just and reasonable" "rates, terms, and conditions" for "pole attachments," 47 U.S.C. 224(b)(1), and it defines "pole attachment" to mean "any attachment by a cable television system *or provider of telecommunications service* to a pole, duct, conduit, or right-of-way owned or controlled by a utility." 47 U.S.C. 224(a)(4) (1994 & Supp. IV 1998) (emphasis added). Other subsections of the Act provide, *inter alia*, that the Commission "shall

* * * prescribe regulations" based on specified cost-apportionment formulas "to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services," 47 U.S.C. 224(e)(1) (Supp. IV 1998), and that "[a] utility shall provide * * * any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it," 47 U.S.C. 224(f)(1) (Supp. IV 1998).[4]

The court of appeals rejected the FCC's position, see Pet. App. 91a-96a, that an attachment by a wireless telecommunications provider, no less than an attachment by a wireline provider, is an "attachment by a * * * provider of telecommunications service" within the meaning of the Act. The court stated:

> Section 224(a)(4) defines a pole attachment as "any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility." A utility, according to section 224(a)(1) is "any person . . . who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications." Read in combination, these two provisions give the FCC authority to regulate attachments to poles used, at least in part, for *wire* communications, and by negative implication does not give the FCC authority over attachments to poles for *wireless* communications.

[4] For purposes of the Pole Attachments Act, as well as other provisions of Title 47, the term "'telecommunications' means the transmission, between or among points specified by the user, of information of the user's choosing." 47 U.S.C. 153(43) (Supp. IV 1998). In turn, "'telecommunications carrier' means any provider of telecommunications services," 47 U.S.C. 153(44) (Supp. IV 1998), and the term "'telecommunications service' means the offering of telecommunications for a fee directly to the public * * *, regardless of the facilities used," 47 U.S.C. 153(46) (Supp. IV 1998).

Id. at 21a-22a (footnotes omitted). In the court's view, "[t]he statutory language of section 224 itself prohibits the FCC from regulating pole attachments for wireless communications; thus, we may end our review with that language." *Id.* at 22a n.25.

The court added that the "original purpose behind regulating utility poles" was "to prevent the telephone and power companies from charging monopoly rents to connect to their bottleneck facilities." Pet. App. 24a (footnote omitted). The court stated that the utilities' "poles are not bottleneck facilities for wireless systems," since their attachments could be placed "on any tall building," and wireless networks may "continue working if one antenna malfunctions." *Id.* at 25a. The court concluded that, because "utility poles are not bottleneck facilities for wireless systems," and "because the 1996 Act deals with wire and cable attachments to bottleneck facilities, the act does not provide the FCC with authority to regulate wireless carriers." *Ibid.*

c. Judge Carnes dissented. In his view "the statute unambiguously gives the FCC regulatory authority over wireless telecommunications service and Internet service." Pet. App. 41a.

With respect to cable television operators that provide Internet access through cable modems, Judge Carnes reasoned that the majority's conclusion that such Internet access "is neither a cable service nor a telecommunications service, and is thus not covered by the rate formulas described in section 224(d) for 'solely' cable services and in section 224(e) for telecommunications services * * * fails to address the section 224(b)(1) mandate that the FCC 'regulate the rates,

terms, and conditions for pole attachments.'" Pet. App. 39a. He explained that "[b]ecause pole attachment is defined as 'any attachment,' * * * section 224(b)(1) requires the FCC to ensure just and reasonable rates for all pole attachments, including those used to provide Internet service." *Id.* at 39a-40a.

With respect to wireless telecommunications services, Judge Carnes relied again on the fact that "pole attachment" is defined as "*any* attachment by a * * * provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility." Pet. App. 37a. In his view, "[a]pplying that definition * * *, the FCC has the authority to regulate *all* attachments, i.e., attachments 'of whatever kind,' by a * * * provider of telecommunications service." *Id.* at 38a (citation omitted). Although the majority had relied on the statutory definition of "utility," Judge Carnes explained that that definition "serves merely to exempt from mandatory access any utility that does not make its poles available for wire communications at all." *Ibid.* But "once a utility makes its poles available, even 'in part,' for wire communications, it is subject to mandatory access for all pole attachments." *Ibid.* In sum, "[n]othing about the definition of utility negates the FCC's mandate to regulate rates for all pole attachments." *Id.* at 38a-39a.

5. The government and other parties sought rehearing en banc. The court of appeals denied that request in a short per curiam order. Pet. App. 44a. Judge Carnes filed a statement concerning the denial of rehearing en banc. He observed that "five of the twelve judges in active service on this Court are disqualified from participating in this important case." *Id.* at 46a. That fact, he explained, made it nearly automatic that the court would deny the government's rehearing en

banc petition, because, under Eleventh Circuit precedent, the court could not grant such a petition without the support of a majority of "all active circuit judges serving on the court at the time of the poll including those judges who are disqualified from participating," and such a majority could not be obtained without the participation of the author of the panel majority's opinion. *Id.* at 45a.

INTRODUCTION AND SUMMARY OF ARGUMENT

The court of appeals held that the rate protections of the Pole Attachments Act do not apply to cable television systems that provide Internet access in addition to cable television programming over their wires and that those protections do not apply in full (and, under one interpretation, do not apply at all) to providers of wireless telecommunications services. Both of those holdings are wrong. In both rulings, the court of appeals not only contradicted the most natural reading of the text of the Act, but also rejected the interpretation of the Act adopted by the FCC, the agency charged with implementing it. The court of appeals' decision would thereby impede the achievement of national communications policy objectives that Congress embodied in the Telecommunications Act of 1996.

I. The coverage provisions of the Pole Attachments Act provide that the FCC "shall regulate" the rates for "pole attachments," 47 U.S.C. 224(b)(1), and define "pole attachments" as "*any* attachment by a cable television system or provider of telecommunications service," 47 U.S.C. 224(a)(4) (1994 & Supp. IV 1998) (emphasis added). An attachment by a cable television system that is used to provide commingled cable television service and Internet access is an attachment "by a cable television system." Such an attachment is

accordingly protected by the Act. Other provisions of the Act demonstrate that when Congress wanted to exclude certain categories of pole attachments from the otherwise broad terms of the Act, it did so explicitly. Because Congress did not explicitly exclude attachments used to provide cable television service when they are used to provide commingled Internet access as well, it is clear that the Act protects such attachments.

Congress had sound policy reasons not to accept the rule adopted by the court of appeals, which would in effect penalize cable television systems for providing commingled Internet access by removing their attachments from the Act's protections as soon as such access is provided. Two provisions of the Telecommunications Act of 1996 state Congress's intent to encourage the development of broadband access and to promote the continued development of the Internet. Those purposes are consistent with a regime in which cable television systems can provide commingled Internet access without suffering a financial penalty; they are not consistent with the regime envisioned by the court of appeals, in which cable television systems are in effect penalized as soon as they invest in providing broadband Internet access as well as cable television service to their subscribers.

The court of appeals believed that two other provisions of the Act added in 1996, which provide specific rate structures for pole attachments used "solely to provide cable service" and for pole attachments used "to provide telecommunications services," narrowed the general mandate to the FCC to ensure just and reasonable rates for any attachment by a cable television system. That conclusion is mistaken. The two rate provisions do not purport to amend the Act's basic coverage provisions, which were broadened, not narrowed, by the 1996 amendments. Each of the two rate provisions can be given its full scope in governing rates for the particular services covered without upsetting the general and express mandate of the Act that *all* pole attachments by cable television systems are protected by the Act.

Finally, insofar as any doubt may remain regarding the scope of the Act, the FCC's determination that the Act protects attachments used to provide commingled cable television service and Internet access is entitled to deference. Congress delegated to the FCC the authority to implement both the Pole Attachments Act and the Communications Act of which it is a part, and this Court has repeatedly held that courts must defer to the FCC's reasonable constructions of the Communications Act. The FCC's construction of the Act in this case is based on its most natural reading and the policies that underly it. That construction is therefore at the very least reasonable. Accordingly, it should be controlling.

II. The court of appeals also erred in holding that the Pole Attachments Act provides limited or no protection for wireless—as opposed to wireline—telecommunications service. As noted above, the Act defines a covered pole attachment to include "any attachment by a * * * provider of telecommunications service." 47 U.S.C. 224(a)(4) (1994 & Supp. IV 1998). That definition makes no distinction between providers of wireless telecommunications service and providers of wireline telecommunications service. Moreover, the Act's definition of "[t]elecommunications service"—applicable both to the Pole Attachments Act and to the Communications Act as a whole—expressly precludes any such distinction based on the type of facility used to provide the service; it defines such service as the

offering of telecommunications directly to the public "*regardless of the facilities used.*" 47 U.S.C. 153(46) (Supp. IV 1998) (emphasis added).

The court of appeals reasoned that attachments used to provide wireless services were excluded from the full protection of the Act because the only poles covered by the Act are those "owned or controlled by a utility," 47 U.S.C. 224(a)(4) (1994 & Supp. IV 1998), and the term "utility" is defined as a company that owns poles "used, in whole or in part, for any *wire* communications." 47 U.S.C. 224(a)(1) (1994 & Supp. IV 1998). Those definitions, however, concern which poles are subject to the Act. Once it is determined (as is not in dispute in this case) that certain poles are subject to the Act because they are used for wire communications, the Act makes no further distinction based on whether the attachments to those poles are used to provide wireless or wireline telecommunications service. Rather, as noted above, if an "attachment" is made "by a provider of telecommunications service," it is protected by the Act. It makes no difference whether the attaching entity uses wireless, wireline, or some hybrid type of facility to provide the telecommunications service.

The court of appeals supported its exclusion of attachments for wireless telecommunications services by finding that poles are not "bottleneck facilities" for wireless carriers, reasoning that Congress intended the Act to address only the chokehold that telephone and power companies have over bottleneck facilities. The terms of the Act, however, nowhere refer to "bottleneck facilities," and Congress deliberately chose not to entangle questions of coverage under the Act in contentious disputes about which poles are "bottleneck facilities." Accordingly, it is the unqualified term "provider of telecommunications service," not a court's

conception of what constitutes a "bottleneck facility," that defines the scope of the Act's protections. Since the term "provider of telecommunications service" extends to providers of wireless service, the coverage of the Act extends to them as well.

ARGUMENT

I. THE POLE ATTACHMENTS ACT PROTECTS POLE ATTACHMENTS BY CABLE TELEVISION SYSTEMS THAT PROVIDE COMMINGLED CABLE TELEVISION SERVICE AND INTERNET ACCESS

A. Section 224 By Its Terms Protects Attachments To Provide Commingled Cable Television And Internet Access

1. Section 224(b)(1) of the Pole Attachments Act authorizes the FCC to "regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable." 47 U.S.C. 224(b). That language defines the FCC's jurisdiction unambiguously. If an item is a "pole attachment[]," then the FCC has jurisdiction to regulate the "rates, terms, and conditions" for it. If an item is not a "pole attachment[]," Section 224 does not provide the FCC with jurisdiction to regulate its rates, terms, or conditions.

Section 224(a)(4) defines the term "pole attachment." It provides that

> [t]he term 'pole attachment' means any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility.

47 U.S.C. 224(a)(4) (1994 & Supp. IV 1998). When that definition is read together with Section 224(b)'s grant of jurisdiction to the FCC, the result is that if an item is

an "attachment by a cable television system * * * to a pole, duct, conduit, or right-of-way owned or controlled by a utility," then the FCC has jurisdiction to regulate the "rates, terms, and conditions" for it.[5]

2. In the order under review in this case, the FCC addressed the question whether "a cable system is entitled to a Commission-regulated rate for pole attachments that the cable system uses to provide commingled data and video." Pet. App. 85a. In that situation, cable television service and Internet access are routed through the same pole attachments—indeed, through the same wires at the same time. See *BCI Telecom Holding, Inc.* v. *Jones Intercable, Inc.*, 3 F. Supp. 2d 1165, 1170-1172 (D. Colo. 1998). Such pole attachments —just like attachments used solely to provide cable television images—are clearly attachments "by a cable television system." Accordingly, such pole attachments are subject to the protections of the Act. As the FCC explained, because the definitional provisions of the Pole Attachments Act cited above do not "turn on what type of service the attachment is used to provide" so long as it is by a "cable television system," Pet. App. 85a, the terms of the Pole Attachments Act require that "the rates, terms and conditions for all pole attachments by a cable television system are subject to" FCC jurisdiction. *Id.* at 86a.

3. "As in any case of statutory construction, [the] analysis begins with the language of the statute. * * * And where the statutory language provides a clear answer, it ends there as well." *Hughes Aircraft Co.* v.

[5] Except where otherwise specified, we use the term "pole" to refer to any of the items to which a "pole attachment" may be made under Section 224(a)(4)—*i.e.*, a "pole, duct, conduit, or right-of-way."

Jacobson, 525 U.S. 432, 438 (1999) (citation and internal quotation marks omitted). The terms of Section 224(a) and (b) of the Pole Attachments Act are exceptionally clear in granting the FCC jurisdiction to regulate pole attachment rates for commingled cable television and Internet service. That clarity is emphasized by two other provisions of the Act that do exclude certain pole attachments from the jurisdiction conferred on the FCC. Those provisions demonstrate that Congress was quite precise in defining the scope of the Act and fully capable of limiting that scope where it saw fit. No such limitation applies to attachments used to provide commingled cable television service and Internet access.

a. Section 224(c) provides that "[n]othing in this section shall be construed to apply to, or to give the Commission jurisdiction with respect to * * * pole attachments in any case where such matters are regulated by a State." 47 U.S.C. 224(c)(1) (1994 & Supp. IV 1998). A state regulatory program ousts the Commission of jurisdiction under that provision only if the program satisfies certain statutory requirements.[6] If the State satisfies those conditions, the FCC has no jurisdiction over attachments in that State. See *States That Have Certified That They Regulate Pole Attachments*, 7 F.C.C.R. 1498 (1992) (public notice that FCC has no jurisdiction over pole attachments in 19 jurisdictions that have certified that they satisfy the Section 224(c) conditions).

[6] For example, the State's regulatory program must "consider the interests of * * * the subscribers of the services offered via such attachments" as well as the interests of utility consumers, 47 U.S.C. 224(c)(2)(B) (1994 & Supp. IV 1998), and the State's program must provide prompt action on complaints, 47 U.S.C. 224(c)(3)(B).

b. Section 224(a)(5) provides that "[f]or purposes of [the Pole Attachments Act], the term 'telecommunications carrier' * * * does not include any incumbent local exchange carrier." 47 U.S.C. 224(a)(5) (Supp. IV 1998).[7] Because no incumbent local exchange carrier (ILEC) is a "telecommunications carrier," no ILEC can be a "provider of telecommunications service" for purposes of the definition of "pole attachment" in Section 224(a)(4). Consequently, as the Commission explained, an "ILEC has no rights under Section 224 with respect to the poles of other utilities." Pet. App. 63a. Congress had long ago found when it first enacted the Pole Attachments Act that "poles, ducts, and conduits are usually owned by *telephone* and electric power utility companies, which often have entered into joint use or joint ownership agreements." S. Rep. No. 580, *supra*, at 12 (emphasis added); see also *ibid.* (noting that agreements between telephone and electric utilities usually provide that "communications pole space is * * * under the control of the telephone company"). The evident purpose of the Section 224(a)(5) exclusion of ILECs is that there was no need to provide rate protection to entities that usually owned or controlled the poles themselves.

c. Sections 224(a)(5) and 224(c) demonstrate that Congress knew precisely how to limit the reach of the FCC's jurisdiction and the types of pole attachments covered by the Act when it wanted to do so. Aside

[7] An "incumbent local exchange carrier" is elsewhere specified to be the carrier that provided local telephone service in a given area, typically on a monopoly basis, as of February 8, 1996. 47 U.S.C. 251(h) (Supp. IV 1998). A firm newly attempting to compete in providing telephone service in a local area is generally not an ILEC.

from those exclusions, however, the Act has no other exclusions. "[*A*]*ny* attachment" to a utility pole by a cable television system—including an attachment used to provide commingled cable television and Internet access—is protected by the Act.

4. Finally, the court of appeals' construction is also inconsistent with Section 224(f)(1), which provides that "[a] utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it." 47 U.S.C. 224(f)(1) (Supp. IV 1998). That provision grants an unqualified right of access to cable systems and telecommunications carriers without regard to whether they provide additional services. Such a right of access would be futile if the utility were free to price some of those competing service providers out of the market, as the utility would be free to do to cable systems under the court of appeals' decision. A power to regulate rates narrower than the statutory grant of access does not make sense.

B. Congress Had Sound Policy Reasons For Including Commingled Cable Television Service And Internet Access In The Act's Protections

Under the court of appeals' decision, the full protections of the Act apply to attachments by a cable television system that are used solely to provide conventional cable television programming to its customers. But as soon as the cable television system uses its wires to provide additional services—such as Internet access—to those customers as well, the Act's protections would cease and the utilities that own or control the poles could charge whatever rates they wish for the pole attachments. That result is not only contrary to the plain meaning of the Pole Attachments

Act, but it is inconsistent with the congressional policy underlying the Telecommunications Act of 1996, which was designed in part to encourage the rapid development of inexpensive broadband Internet access. That policy is most clearly manifested in two provisions of the Telecommunications Act—which included the 1996 amendments to the Pole Attachments Act.

First, Congress in the Telecommunications Act directed the FCC to "encourage the deployment" of broadband capability to all Americans and, if necessary, to "take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment." See Pub. L. No. 104-104, Tit. VII, § 706(a), (b) and (c)(1), 110 Stat. 153 (47 U.S.C. 157 note). Under the FCC's interpretation of the Pole Attachments Act, cable television systems, which already have wires connected to many American homes, may upgrade their facilities to provide commingled Internet access while retaining their protections against monopolistic pricing under the Pole Attachments Act. That will certainly "encourage the development" of broadband capability and "remov[e] barriers to infrastructure development" by the cable industry to provide such capability. By contrast, under the court of appeals' decision, cable television providers would lose their protection from monopolistic prices for pole attachments as soon as they upgrade their facilities to provide commingled Internet access to their customers. That would *discourage* the rapid development of broadband capability, contrary to Congress's expressed policy.

Second, Congress declared in the Telecommunications Act that "[i]t is the policy of the United States * * * to promote the continued development of the Internet and other interactive computer services and

other interactive media." Pub. L. No. 104-104, Tit. V, § 509, 110 Stat. 138 (47 U.S.C. 230(b)(1) (Supp. IV 1998)). The FCC's interpretation of the Act, which permits cable television providers to add commingled Internet access to the services they offer, would make such access more widely available, and it would thus "promote the continued development of the Internet." By contrast, the court of appeals' decision would permit cable television systems to enter the market for broadband Internet access to their existing customers only at the cost of losing the rate protections they currently enjoy for their pole attachments. That would provide a disincentive for cable providers to enter the market for broadband Internet access, and it would thereby retard—not promote—the continued development of the Internet.[8]

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[8] Indeed, as utilities themselves increasingly enter the market for provision of Internet access, they have an incentive not only to charge monopolistic prices for pole attachments, but also to discriminate against their cable company competitors with respect to the terms and conditions of access to the bottleneck facilities at issue here. See *In re Promotion of Competitive Networks in Local Telecommunications Markets*, 14 F.C.C.R. 12,673, 12,681 (1999) (para. 12) (noting that "companies offering or planning to offer two-way broadband services to residential consumers include * * * public utilities within their utility service territories"); *In re Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, 14 F.C.C.R. 2398, 2427 (1999) (para. 55) ("A growing number of public utilities are offering broadband within their utility service territories. * * * Utility-based offerings have begun in major northeastern cities, San Francisco, and have begun or are under study in smaller cities.").

C. The Act's Special Rate Provisions For Attachments "Used * * * Solely To Provide Cable Service" Or Attachments "Used By Telecommunications Carriers To Provide Telecommunications Services" Do Not Restrict The Basic Coverage Of The Act

The court of appeals did not dispute that, prior to the 1996 amendments, the Pole Attachments Act applied to attachments used to provide commingled cable television and Internet access. The FCC had concluded that the unamended Act applied to such attachments in a decision that was affirmed by the D.C. Circuit in 1993 in *Texas Utilities Electric Co.* v. *FCC*, 997 F.2d 925. In this case, the Eleventh Circuit distinguished *Texas Utilities* on the ground that it was decided "before the 1996 amendments were enacted," Pet. App. 30a n.32, and the court relied for its contrary conclusion solely on two provisions that were part of the 1996 amendments. See *id.* at 27a (FCC's position "requires us to disregard the unambiguous language *of the 1996 Act*") (emphasis added), 32a ("*[T]he 1996 Act* does not authorize the FCC to regulate pole attachments for Internet service.") (emphasis added). Those provisions do not support the court's result.

1. a. The first provision relied on by the court of appeals was Section 224(d). In the original Act, Section 224(d) specified certain characteristics of what constitutes a "just and reasonable rate" for pole attachments by cable television systems (which were the only pole attachments covered by the Act at that time). Essentially, it provided that a "just and reasonable" rate for such attachments is at least the "marginal cost of attachments," see *Florida Power*, 480 U.S. at 253, and at most the percentage of the total pole expenses equal to the percentage of usable space on the pole occupied by the attachment, or the "fully allocated cost" of the

construction and operation of the pole to which cable is attached, *ibid.* See generally 47 U.S.C. 224(d)(1).

The 1996 amendments made no change to Section 224(d)(1) and (2), which specify the rate methodology. They added, however, a new Section 224(d)(3), which provides that "[t]his subsection shall apply to the rate for any pole attachment used by a cable television system solely to provide cable service." 47 U.S.C. 224(d)(3) (Supp. IV 1998).[9] The 1996 amendments thus require the Commission to grandfather pole attachments for cable systems used "solely to provide cable service" into the preexisting rate structure for attachments. Under the amended Act, the Commission may not determine that pole attachments for such systems are subject to any higher (or lower) rate.

b. The second provision relied on by the Eleventh Circuit is Section 224(e). That provision was added by the 1996 amendments. The 1996 amendments had for the first time expanded the basic definition of "pole attachment"—and, accordingly, the scope of the Act's protections—beyond cable television systems to include "any attachment * * * by a provider of telecommunications service." 47 U.S.C. 224(a)(4) (1994 & Supp. IV 1998). The new Section 224(e) addressed the

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[9] Section 224(d)(3) also includes an interim rule providing that, until the FCC could promulgate new regulations under a newly added subsection (e), "this subsection shall also apply to the rate for any pole attachment used by a cable system or any telecommunications carrier * * * to provide any telecommunications service." 47 U.S.C. 224(d)(3) (Supp. IV 1998). In a portion of the order under review that is not challenged in this case, the FCC promulgated the new regulations to which Section 224(d)(3) refers. See Pet. App. 59a, 64a-65a, 79a-162a. This part of Section 224(d)(3) accordingly has no continuing effect.

content of the rates for this newly protected class of attachments.

In particular, Section 224(e)(1) requires the Commission to "prescribe regulations * * * to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services." 47 U.S.C. 224(e)(1) (Supp. IV 1998). The "just, reasonable, and nondiscriminatory rates" provided for in such regulations must satisfy certain requirements distinct from those of Section 224(d). The new formula, specified in Section 224(e)(2) and (3), can be quite complex. As the Commission explained in its order, it "allocates the costs of the portion of the total pole cost associated with the usable portion of the pole and the portion of the total pole cost associated with the unusable portion of the pole in a different manner." Pet. App. 66a. Essentially, Section 224(e) "apportion[s] the cost of the space other than the usable space equally among all * * * attachments" and "apportion[s] the cost of the usable space according to the percentage of usable space required for each entity." H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 206 (1996).

Since the Section 224(e) rate includes an allocation for unusable as well as usable space on the pole, it will generally be higher than the rate applicable to pole attachments used "solely to provide cable service" under Section 224(d). At the time the 1996 Act was passed, Congress expected cable operators to go into competition with local telephone companies almost immediately. See H.R. Conf. Rep. No. 458, *supra*, at 148. Section 224(e) thus requires the Commission to level the competitive playing field in the telecommunications area as between cable companies that choose to provide conventional telecommunications services and other carriers providing such service; the rate

prescribed by Section 224(e) applies in both situations. See H.R. Conf. Rep. No. 458, *supra*, at 206; S. Rep. No. 367, 103d Cong., 2d Sess. 65 (1994).

2. The court of appeals read these two provisions—Section 224(d) and (e)—to embody a new limitation on the FCC's jurisdiction, such that a pole attachment used to provide services that fall within neither provision is excluded from the basic "just and reasonable rate" protections of the Act in Section 224(a) and (b). In the court's view, "subsections (d) and (e) narrow (b)(1)'s general mandate to set just and reasonable rates." Pet. App. 27a n.29. The court stated that "[t]he straightforward language of subsections (d) and (e) directs the FCC to establish two specific just and reasonable rates, one for cable television systems providing solely cable service and one for telecommunications carriers providing telecommunications service; no other rates are authorized." *Ibid.* After reaching its own conclusion that Internet access does not qualify either as "solely cable television service" or "telecommunications service"—an issue expressly left open by the FCC, see *id.* at 89a—the court ruled that commingled cable television service and Internet access is therefore outside the FCC's jurisdiction.

3. The court of appeals' conclusion is mistaken. At the most basic level, neither Section 224(d) nor Section 224(e) alters the coverage provisions of the Act in Section 224(a) and (b). Indeed, the only amendment to those coverage provisions made in 1996 served to *broaden* the definition of "pole attachment" to include not merely "any attachment by a cable television system," but rather "any attachment by a cable television system *or provider of telecommunications service.*" 47 U.S.C. 224(a)(4) (1994 & Supp. IV 1998) (emphasis added). That change was a pure extension—not a

narrowing—of the Act's protections. See H.R. Conf. Rep. No. 458, *supra*, at 206 (amendment, which originated in House version of bill, "expands the scope of the coverage of section 224"). Had Congress intended to limit the FCC's authority over attachments to provide cable television service, it surely would have expressed that intention in either the basic regulatory mandate of Section 224(b)(1) or the definitions in Section 224(a). It did neither.

For that reason, the court of appeals erred in stating that, aside from the rates for attachments used "solely to provide cable service" (Section 224(d)) and those used to provide "telecommunications services" (Section 224(e)), "no other rates are authorized." Pet. App. 27a n.29. Section 224(b)(1) expressly authorizes the FCC to ensure "just and reasonable" rates for all items defined as "pole attachments" in Section 224(a)(4)—even those that fall outside the categories in Section 224(d) and (e). For attachments by a cable television system that fall outside those categories, Congress has not further specified the content of the rates. But Congress nonetheless authorized the FCC in Sections 224(a) and (b) to ensure that they are "just and reasonable."[10]

4. Nor is there anything in Section 224(d) and (e) that purports to "narrow [Section] (b)(1)'s general mandate to set just and reasonable rates" for pole attachments. Pet. App. 27a n.29. Those provisions each address a different issue—the specification of what

[10] In a ruling not at issue in this case, the FCC carried out its mandate to ensure that rates for commingled cable television service and Internet access are "just and reasonable" by providing that such rates would be the same as the Section 224(d) rates for attachments used solely to provide cable service. See Pet. App. 87a-90a.

constitutes a "just and reasonable" rate for particular categories of pole attachments. Section 224(d)(1), for example, begins by stating that "a rate is just and reasonable" if it satisfies certain conditions, and Section 224(d)(3) provides that "[t]his subsection shall apply to the rate" for pole attachments used "solely to provide cable service." 47 U.S.C. 224(d)(3) (Supp. IV 1998). Section 224(d) thus unambiguously requires the FCC to set rates for pole attachments used "solely to provide cable service" within the statutory parameters. While Section 224(d) therefore dictates the contents of some rates, it does not have anything to do with excluding rates for other attachments from the protections of the Pole Attachments Act altogether.

Similarly, Section 224(e) requires the FCC to prescribe regulations "to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services." 47 U.S.C. 224(e)(1) (Supp. IV 1998). It goes on, unambiguously, to require the FCC to set rates for such pole attachments within certain statutory parameters. Like Section 224(d), however, it contains nothing suggesting any withdrawal of the FCC's power to regulate rates for other pole attachments.

D. The Court Of Appeals' Construction Of The Act Disregarded Settled Principles Under Which The FCC's Construction Of The Communications Act Is Entitled To Deference

1. We have demonstrated that the text and purpose of the Pole Attachments Act both require reversal of the court of appeals' conclusion. If any doubt remained on the subject, however, the fact that the FCC has construed the Act to govern rates for pole attachments

for commingled cable television service and Internet access would eliminate it.

There can be no doubt that Congress has delegated to the FCC the authority to implement the Pole Attachments Act. The Act itself is framed as a grant of ratemaking authority to the Commission in Section 224(b)(1), and another portion of that same Section provides that "[t]he Commission shall prescribe by rule regulations to carry out the provisions of this section." 47 U.S.C. 224(b)(2). In addition to that specific authority, the Pole Attachments Act is a part of the Communications Act of 1934. See 92 Stat. 35 (originally enacting the Pole Attachments Act by providing that "the Communications Act of 1934 is amended by adding at the end thereof the following new section"). As this Court noted in *AT&T* v. *Iowa Utilities Board*, 525 U.S. 366, 377 (1999), Section 201(b) of the Communications Act provides that "[t]he Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of [the Communications Act of 1934]." 47 U.S.C. 201(b). Thus, there is more than ample basis to conclude that Congress entrusted the FCC with authority to implement and construe the Pole Attachments Act.

This Court has acknowledged that the Commission's reasonable resolutions of any ambiguities in the Communications Act (and, hence, the Pole Attachments Act which forms a part of it) are therefore controlling. In *Iowa Utilities Board*, for example, much of the Court's decision rested on the proposition that the FCC's reasonable interpretations of the Act are entitled to be upheld. See, *e.g.*, 525 U.S. at 387 (upholding an FCC definition of a statutory term because it is "eminently reasonable"), 394 (upholding FCC rule because "we cannot say that [the rule] unreasonably interprets the

statute"). As the Court summarized, "Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency." *Id.* at 397 (citing *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842-843 (1984)).

If there are any ambiguities with respect to the scope of the protections of the Pole Attachments Act, the FCC's reasonable resolution of those ambiguities is therefore dispositive. As we have explained above, the FCC applied the Act according to its most natural interpretation and entirely consistently with the policies that underly it to protect attachments used to provide commingled cable television service and Internet access. The FCC's interpretation is at the very least a reasonable one, and it accordingly suffices to remove any lingering uncertainty about the scope of the Act's protection.

2. Because the court of appeals erroneously believed that a pole attachment by a cable television system receives statutory protection only if it is used to provide services falling within one of the two rate categories set forth in Section 224(d)(3) and Section 224(e)(1), it mistakenly felt compelled to address whether a cable company's provision of Internet access is properly characterized as a "cable service," a "telecommunications service," or an "information service." See Pet. App. 27a-29a. The Commission had based its conclusion that attachments to provide commingled cable television service and Internet access are protected by the Act squarely and exclusively on the broad provisions and definitions of Section 224(b)(1) and (a)(4). See Pet. App. 85a-86a. The Commission specifically cautioned that it "need not decide at this time * * * the precise category into which Internet services fit," *id.* at 89a, and the Commission referred to ongoing

proceedings it had undertaken at Congress's direction that would reconsider its earlier conclusion in another proceeding that the provision of Internet access is not the provision of telecommunications service, *id.* at 87a-89a. To date, the FCC has taken no position on that issue, which has very broad implications for the rights and obligations of cable systems—including the exceptionally important question whether a cable operator can be compelled to provide unaffiliated Internet service providers with "open access" to its cable facilities. See *ibid.*; see also *In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 15 F.C.C.R. 19,287, 19,293-19,298 (2000) (paras. 14-24) (seeking comment on proper statutory classification of high-speed Internet access using cable modem technology); *In re Federal-State Joint Board on Universal Service*, 13 F.C.C.R. 11,501, 11,535 n.140 (1998); but cf. *AT&T* v. *City of Portland*, 216 F.3d 871, 878 (9th Cir. 2000) (holding that "to the extent that [a firm] provides its subscribers Internet transmission over its cable broadband facility, it is providing a telecommunications service as defined in the Communications Act").

Even if the court of appeals were correct that the coverage question in this case turns on the correct characterization of Internet access, there would still be no need for this Court in the first instance to rule on that characterization question. If the Court concluded that FCC authority over pole attachments by cable television systems that provide commingled Internet access depended on whether such Internet access is a "cable service," a "telecommunications service," or some other kind of service, the appropriate course for this Court would be to remand the case to the FCC—the step the court of appeals should itself have taken

when it ruled (mistakenly) that the characterization of Internet access was determinative. Because implementation of the Communications Act is entrusted to the FCC, it is that agency—not this Court and certainly not the court of appeals—that should address the characterization issue in the first instance. See *IRS* v. *FLRA*, 494 U.S. 922, 933 (1990) (citing *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943)).

II. THE POLE ATTACHMENTS ACT PROTECTS PROVIDERS OF WIRELESS TELECOMMUNICATIONS SERVICE NO LESS THAN PROVIDERS OF WIRELINE TELECOMMUNICATIONS SERVICE

1. As explained above, the protections of the Pole Attachments Act apply to "any attachment by a * * * provider of telecommunications service." 47 U.S.C. 224(a)(4) (1994 & Supp. IV 1998). "Telecommunications service" is defined as the offering of telecommunications for a fee directly to the public "regardless of the facilities used." 47 U.S.C. 153(46) (Supp. IV 1998); see also 47 U.S.C. 153(43) (Supp. IV 1998) (defining "telecommunications"). Congress thus unambiguously applied the protections of Section 224 to "any attachment" by carriers that provide "telecommunications for a fee directly to the public * * * regardless of the facilities used." See Pet. App. 95a. As that language specifies, the particular facilities used to provide telecommunications services—wireless, wireline, or some combination of the two—are of no consequence. Congress could not have been clearer in extending the Section 224 protections to attachments used to provide wireless telecommunications services to the same extent as wireline telecommunications services.

That conclusion follows as well from Section 224(d)(3) of the Act. As we have noted, see p. 23 n.9, *supra*, that

provision states that the Section 224(d) rate formula "shall apply to the rate for any pole attachment used by a cable system or *any* telecommunications carrier * * * to provide any telecommunications service" until the FCC could adopt regulations specifically applicable to providers of telecommunications services. 47 U.S.C. 224(d)(3) (Supp. IV 1998) (emphasis added). As the FCC recognized, in Section 224(d)(3) as in Section 224(a)(4), "the use of the word 'any' precludes a position that Congress intended to distinguish between wire and wireless attachments." Pet. App. 95a. Cf. *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is, one or some indiscriminately of whatever kind.") (internal quotation marks and citation omitted).

2. The court of appeals did not hold that anything in the definition of the term "telecommunications service" or related terms suggests that it applies only to wireline, and not wireless, services. Instead, the court of appeals excluded attachments used to provide wireless services from the full protection of Section 224 on the ground that the Pole Attachments Act protects only attachments to poles "owned or controlled by a utility," 47 U.S.C. 224(a)(4) (1994 & Supp. IV 1998), and that the Act elsewhere defines a "utility" as a company that owns poles "used, in whole or in part, for any *wire* communications." 47 U.S.C. 224(a)(1) (1994 & Supp. IV 1998) (emphasis added). The court of appeals detected a "negative implication" in those provisions, such that they "give the FCC authority to regulate attachments to poles used, at least in part, for *wire* communications, and * * * do[] not give the FCC authority over attachments to poles for *wireless* communications." Pet. App. 22a.

There is no relevant "negative implication" in the provisions cited by the courts of appeals. To be sure, the provision defining "utility" does preclude the FCC from regulating the rates for attachments to *poles* that are not used for wire communications. That is not a "negative implication" of the statutory text, but rather a direct consequence of the fact that authority over such poles is nowhere granted to the FCC and that the FCC may exercise only authority granted to it by Congress. Once a pole owned by an electric or telephone company or some other utility is used for wire communications, however, it comes within the definition of a "pole * * * controlled by a utility" under the Act and attachments to it come within the Act's protections. The question whether a particular attachment to that pole is covered by the Act turns on whether the attachment is made "by a cable television system or provider of telecommunications services"—a question that has nothing to do with the definition of "utility."

3. The court of appeals' misreading of the statutory text should be corrected, and further analysis of the policy rationales for protecting (or not protecting) attachments used for wireless communications are largely beside the point. Moreover, the court of appeals' effort to support its result with reference to the policies of the Pole Attachments Act is also unpersuasive. The court stated that Congress's purpose in passing the Act was "to prevent the telephone and power companies from charging monopoly rents to connect to their bottleneck facilities." Pet. App. 24a (footnote omitted). The court believed that "[utility] poles are not bottleneck facilities for wireless carriers."

Ibid.[11] The court concluded that "[b]ecause they are not, and because the 1996 Act deals with wire and cable attachments to bottleneck facilities, the act does not provide the FCC with authority to regulate wireless carriers." *Id.* at 25a.

As a legal matter, the terms of Section 224(a)(4) are dispositive, regardless of whether those terms extend rate protections to a larger class of beneficiaries or attachments than the particular subclasses with which Congress was most acutely concerned. "[I]t is not, and cannot be, [judicial] practice to restrict the unqualified language of a statute to the particular evil that Congress was trying to remedy." *Brogan* v. *United States*, 522 U.S. 398, 403 (1998). The language of the Pole Attachments Act uses the unqualified term "provider of telecommunications service" to define the entities whose attachments are protected by the Act. The Act does not use the term "bottleneck facility" or any cognate term. Accordingly, it is the unqualified statutory term "provider of telecommunications service"—not a court's conception of what constitutes a "bottleneck facility"—that controls how far the Act extends. Since the term "provider of telecommunications service" extends to providers of wireless service, the coverage of the Act extends to them as well.

As a factual matter, the panel majority was wrong in suggesting that utility poles are not "bottleneck facilities for wireless systems." Wireless systems are

[11] In the court's view, wireless "equipment can be placed on any tall building" and the structure of wireless networks limits the reliance of such networks on any one antenna. Pet. App. 25a. The court did not explain the source for those observations, and a court should not rely on such considerations without at the very least permitting the FCC to examine the relevant facts in the first instance.

typically wireless only between the subscriber's wireless telephone (or, in the case of "fixed wireless" systems, between a central location in the subscriber's building) and the nearest receiving antenna. Wireless providers often depend on wires attached to poles to get their signals from such antennas back to a central location, where they are connected to a network that may itself include pole-to-pole wireline facilities.[12] As a practical matter, a wireless telecommunications service may well depend vitally on poles owned or controlled by utilities to provide service to its customers.

4. The court of appeals' decision might have rested on a misunderstanding of industry realities, and perhaps the decision may reasonably be construed not to exclude a wireless carrier's wireline facilities from the scope of Section 224. In any event, this Court

[12] In *In re Promotion of Competitive Networks in Local Telecommunications Markets*, 14 F.C.C.R. 12,673 (1999), the FCC addressed the need to increase competition for local telephone service, including the removal of obstacles to the ability of "fixed wireless" systems to gain access to multi-unit residential and commercial buildings. The Commission explained that "the prospects for facilities-based competition in the near term are especially great from providers that can avoid the need to duplicate the incumbent [provider's] costly wireline networks, * * * by using wireless technology." *Id.* at 12,677 (para. 5). Such fixed wireless providers frequently mix wireline and wireless elements in their networks. For example, "providers using wireless technology may need access to rooftops on which to place their antennas, and to conduit for laying cable to carry signals from the antenna * * * directly to individual units." *Id.* at 12,691 (para. 34). See also *id.* at 12,686 (para. 25) (noting that"carriers may want to use terrestrial wireless technology in lower spectrum bands or satellite technology to offer customers mobility, but use higher-band terrestrial wireless service or wireline technology for other features, such as broadband interconnectivity, or for transport and termination between cell sites and the public switched network.").

should make clear that Section 224 by its terms extends to "any" attachment by any telecommunications carrier, including any and all attachments by providers of wireless telecommunications services. 47 U.S.C. 224(a)(4) (1994 & Supp. IV 1998). Even if there were any ambiguity in the Act itself, the FCC's construction of the statute as applicable to both wireless and wireline telecommunications carriers is at the very least a reasonable one. Accordingly, that construction should be controlling. See *AT&T* v. *Iowa Util. Bd.*, 525 U.S. at 377.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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